(1-2)

FILED
NOV 30 1925
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

NO. 510 OCTOBER TERM, 1925.

270
33

D. E. WEAVER, Chief of the Bureau of Inspection, in Pittsburgh, of the DEPARTMENT OF LABOR AND INDUSTRY OF THE COMMONWEALTH OF PENNSYLVANIA, Appellant,

vs.

THE PALMER BROTHERS COMPANY, Appellee.

BRIEF FOR APPELLEE.

Appeal From the District Court of the United States for the Western District of Pennsylvania.

FRANK L. McGUIRE,
Alling Building,
New London, Conn.

CARL E. GLOCK,

EDWIN W. SMITH,
747 Union Trust Building,
Pittsburgh, Pa.,

SMITH BROS. CO. INC., LAW PRINTERS, 210-212 GRANT ST., PITTSBURGH, PA.

p. 32

INDEX.

ARGUMENT:		PAGE
I.	Introduction	1
II.	What the Court Decided and the Questions Involved	5
III.	The Purpose of the Act as Suggested by Appellant:	
	(a) Protecting Public Health	6
	(b) Fraud and Deception	7
IV.	History of the Legislation	9
V.	Evidence Submitted to the Court	12
VI.	The Protection Afforded by the Fourteenth Amendment to the Constitution of the United States	17
VII.	Similar Legislation Held Unconstitutional	20
VIII.	The Prohibition of an Article is Unconstitutional if Regulation will Accomplish the Intended Purpose	27
IX.	The Application of the Law to the Testimony	32
X.	The Powell Case	36
XI.	The Effect of the Decision on the Whole Act	37
XII.	Conclusion	39

J43907

CASES CITED.

PAGE

Allgeyer vs. Louisiana, 165 U. S. 578 18
Booth vs. Illinois, 184 U. S. 424; 46 L. ed. 623 30
Crane vs. Campbell, 245 U. S. 364 31
City of St. Louis vs. Evraiff, 256 S. W. 489 30
Greensboro vs. Ehreinreich, 80 Ala. 579; 60 Am. Rep. 130; 2 So. 725 ..... 23, 28
Hannibal & St. Joseph R. R. Co. vs. Husen, 95 U. S. 465 27
Jay Burns Baking Co. et al. vs. Charles W. Bryan et al., April 14, 1924, 68 L. ed. 459 18
Koscinsko vs. Slomberg, 68 Miss. 469 26
Marymont vs. Nevada State Banking Board, 33 Nev. 333; 111 Pac. 295; 32 L. N. S. 477 30
Meyer vs. Nebraska, 262 U. S. 390, 67 L. ed. 1042 19
Missouri vs. Lewis, 101 U. S. 22 20
Mugler vs. Kansas, 123 U. S. 523; 31 L. ed. 210 17
People vs. Weiner, 271 Ill. 74; L. R. A. 1916-C, 775 ..... 11, 20, 27, 35
Powell vs. Commonwealth, 127 U. S. 678; 8 Sup. Ct. 992 ..... 11, 31
Price vs. Illinois, 238 U. S. 466; 59 L. ed. 1400 ..... 19, 31
Schollenberger vs. Pennsylvania, 171 U. S. 1 11
State vs. Taft, 118 N. C. 1190; 32 L. R. A. 122 ..... 24, 29
Terrace vs. Thompson, 263 U. S. 197, 218; 68 L. ed. 255, 275 20
Valley Railways vs. Harrisburg, 280 Pa. 385, 396; 124 Atl. 644, 648 29

IN THE

Supreme Court of the United States

NO. 510 OCTOBER TERM, 1925.

D. E. WEAVER, Chief of the Bureau of Inspection, in Pittsburgh, of the DEPARTMENT OF LABOR AND INDUSTRY OF THE COMMONWEALTH OF PENNSYLVANIA, Appellant,

vs.

THE PALMER BROTHERS COMPANY, Appellee.

Appeal From the District Court of the United States for the Western District of Pennsylvania.

Argument.

I. INTRODUCTION.

The Appellee in this case filed a bill in equity in the District Court of the United States for the Western District of Pennsylvania, asking the Court to enjoin the enforcement of a statute of Pennsylvania (1923, P. L. 802), relating to mattresses, comfortables, etc., upon the ground that it is an unreasonable and arbitrary exercise of the police power violating both the due process and the equal protection clauses of

the Fourteenth Amendment of the Federal Constitution.

The appellee is a manufacturer of bed comfortables in Connecticut, and in making them uses a well-known material which is known as shoddy. The Pennsylvania statute, in Section 1, defines shoddy as follows: "The word 'shoddy' shall mean any material which has been spun into yarn, knit or woven into fabric, and subsequently cut up, torn up, broken up, or ground up."

The statute absolutely prohibits the use of shoddy in the manufacture of mattresses, comfortables, etc. It permits, however, in such manufacture, the use of secondhand material, if sterilized.

Section 2, which contains the prohibition and regulation, is as follows: "No person shall employ or use in the making, remaking, or renovating of any mattress, pillow, bolster, feather bed, comfortable cushion, or article of upholstered furniture: (a) Any material known as 'shoddy,' or any fabric or material from which 'shoddy' is constructed; (b) any secondhand material, unless, since last used, such secondhand material has been thoroughly sterilized and disinfected by a reasonable process approved by the Commissioner of Labor and Industry; * * *."

The complainant based its bill upon the propositions, among others, that if shoddy may be sterilized so that it is no more harmful than the secondhand material referred to in Clause (b) of Section 2 of the Act, then its prohibition is unreasonable and arbitrary, and also that, since the Act prohibits the use of

shoddy in mattresses, comfortables, etc., but fails to prohibit its use in blankets, underclothing and garments of all kinds, it contains an unconstitutional discrimination.

The Act is an unreasonable and arbitrary exercise of the police power in these respects:

(a) It prohibits entirely the use of shoddy, a recognized commercial commodity, whether made from new or secondhand materials, in the making of mattresses, comfortables, etc.

(b) It prohibits all shoddy but permits the use of secondhand materials after sterilization, although it is acknowledged that all shoddy, new or old, may be made harmless by sterilization.

(c) It prohibits shoddy in the making of comfortables, but does not prohibit it in the making of blankets, underclothing or in many other articles of commerce, of equally intimate daily use by people.

The appellee company, for fifty years, has manufactured comfortables of all grades, filled with cotton, wool, down, shoddy (new and secondhand) and other soft materials, garnetted or lapped into thin sheets which are covered with cotton or silk covers. ~~Until recent years,~~ It has used as filling material in a considerable portion of the comfortables produced by it, a material used in trade for many years and known as "shoddy." This is made by picking apart and shredding secondhand garments and other fabrics, and then lapping them into a bat or sheet, so as to be suitable to place in the new cloth covers of a comfortable. This material is what is known in the trade as "shoddy" (Record, p. 79), and the comfortables

made from it are labeled "Filled with secondhand shoddy." In recent years, a large source of filling material has become available in the form of "clippings" or pieces of new cloth, which are obtained from the cutting tables of garment factories, and which have never come into contact with the hands or persons of anybody, except in the processes of manufacture. The filling made from such new materials possesses the appearance of shoddy, and falls within the definition of shoddy in the statute. But, in order to distinguish properly such filling from the secondhand stock covered by the traditional definition of shoddy, the appellees have marketed the comfortables filled with it under the designation of "new dark cotton, carded," which is a trade name (Record, p. 58), and have marketed the comfortables made of old shoddy under the designation "filled with secondhand shoddy material."

The 1920 census shows that millions of pounds of shoddy are used in various industries in the United States. Of the three million comfortables produced annually by the appellee, approximately three-fourths of a million are filled with material classified under the Act as shoddy. In the United States the appellee company constitutes practically the whole industry in comfortables filled with secondhand shoddy (Record, pp. 78, 88). In Pennsylvania, in 1923, the appellee's business totaled $558,773.60, of which $188,984.60 was the price paid to it for comfortables filled with shoddy as defined by the Act. Expressed in dozens, the appellee distributed in Pennsylvania, in 1923, approximately 8,000 dozens of comfortables filled with shoddy, as defined by the Act, of which 3,000 dozens were filled

with secondhand shoddy and 5,000 dozens filled with shoddy made from new materials. There is not enough wool produced in the world to furnish a constant supply for new fabric and there is a commercial necessity for the use of reclaimed cotton and wool fibre.

II. WHAT THE COURT DECIDED AND THE QUESTIONS INVOLVED.

Upon the final hearing in this case the Court granted the injunction asked for by the appellee. We do not believe that the appellant has stated quite clearly what the questions are in this case.

The Court decided this case upon two points in favor of the plaintiff. The first was that, in view of the uncontradicted testimony in the case that sterilization removed all danger from shoddy, the prohibition of shoddy in the manufacture of comfortables was unconstitutional; and the second, that to prohibit the use of shoddy in the manufacture of mattresses, pillows and comfortables and permit its use in blankets, clothing and many other kinds of manufactured goods was also unconstitutional.

Both of these points fall well within the provision of the Fourteenth Amendment, which provides "nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We see no purpose in quoting from the Court's opinion at length. His conclusions and his reasons are written into it in half a dozen different ways.

The assignments of error limit the discussion in this case to these two points. There cannot be any other question.

III. THE PURPOSE OF THE ACT AS SUGGESTED BY APPELLANT.

(a) Protecting Public Health:—

Under the above heading it is stated: "The Court below, in its Opinion, recognizes the purpose of the Act as proper and that the subject matter thereof bears a reasonable relation to the purpose of protecting the public health." We think the decision of the Court in this respect is right, as shown by the quotation in the appellant's paper book. If there was a dispute, with testimony by witnesses as to whether or not the use of shoddy was a menace to public health, that was not a judicial question. But what the Court said is, "There is a dispute as to whether shoddy as now used," that is, unsterilized. There was no dispute that shoddy sterilized was not a menace. But a reasonable relation between the purpose and the subject matter is not enough to sustain a statute, passed for the purpose of protecing public health. There must not be an unreasonable, arbitrary or discriminatory exercise of the authority held by the legislature.

(b) FRAUD AND DECEPTION:—

The appellant, we think, makes too much of an incident of the trial:— A comfortable was offered as an exhibit, which we will assume had been made by the plaintiff company, upon which the label read: "New Dark Cotton Carded". This was a comfortable filled with shoddy, within the meaning of the Pennsylvania law, but it was a new shoddy; that is, shoddy made from materials that had not been subjected to human use,—made from clippings. This sustained the word "new". It was dark cotton; that is, if there was any other material in it, it was wool, which was more expensive than cotton. To label the comfortable "New Dark Cotton Carded" was only a mis-statement in that it did not indicate that a more expensive material was contained in it than cotton. "Carded" indicated that it was a shoddy—cotton torn up. Nobody pretended upon the trial of the case that this label had been put on in compliance with the Pennsylvania statute and for the purpose of evading that statute, because the comfortable had been made and the label affixed, as near as could be learned, prior to the passage of the Pennsylvania statute, or at least prior to its effective date, which was January 1st, 1924; and this comfortable was offered as an exhibit at the preliminary hearing of that case, which was held in February of 1924.

Under this heading also the defendant makes use of the language: "It being undisputed that the Pennsylvania Legislature, in enacting this statute, exercised the police power for proper purposes and over a

subject matter which bears a reasonable relation to those purposes, the due process clause of the 14th Amendment is not violated." Even if the exercise of the police power was for a proper purpose, even if the subject matter of this statute bears a reasonable relation to the purposes, nevertheless, the conclusion of the appellant is wrong, that the due process clause of the 14th Amendment is not violated. This is not a correct statement. There must be something more than a reasonable relation between the purpose of the statute and its subject matter; there must be a reasonable and equable exercise of the police power.

There is nothing in the Act nor in the testimony that would indicate that the Legislature, in the prohibition of shoddy, was attempting to prevent fraud and deception. It would seem that if anything could be seen it would be that a certain material was shoddy, as against any other kind of filling that might be used. But at any rate, the provisions of the statute as to labels seem to be effective as preventing any fraud and deception, and these provisions the Court has permitted to stand.

In his opinion, the Court says:

> "* * * It is just as difficult now to inspect a comfortable for the purpose of ascertaining whether shoddy has been used as filler—as it would be to inspect in order to ascertain whether sterilized shoddy were used as filler. The same complaint might also apply to the provision of the statute which permits the use of secondhand material other than shoddy as filler for mattresses and comfortables, provided they have been prop-

> erly sterilized. It is unreasonable to say: 'We will permit sterilized secondhand materials, but not sterilized shoddy, when both may be inspected with equal facility when bound up in a mattress or comfortable.'"

It seems to us that this needs no further discussion. Whether or not any material has been sterilized is not apparent. To apply the argument to shoddy alone means nothing.

IV. HISTORY OF THE LEGISLATION.

The history of the legislation, we think, is of little value in determining our case. It is well known that if a movement of some sort is started, resulting in the passage of a statute by one of the State legislatures, in a short time it is followed by other States, apparently without very much consideration. Thus it is that, starting in 1909, this bedding legislation has spread in sixteen years to twenty-eight States. The futility of all this legislation is shown by the testimony of Dr. Winslow (Record, p. 105 *et seq.*).

The analysis of these statutes which is given by the appellant's counsel is not the same as ours.

We find that—

Twenty-eight of the States have legislation relating to bedding or mattresses. An examination of these statutes shows that the Pennsylvania statute and the Maryland statute, which was copied after it, are the only ones absolutely prohibiting all shoddy. In five of the twenty-eight States the statutes clearly do not apply to comfortables, and in five other States

it is very doubtful whether the statutes apply to comfortables, leaving eighteen States in which there are regulations on the subject of comfortables.

Most of the bedding legislation contains prohibitory provisions against the use as a bedding material of old mattresses, pillows, and so forth, which have been used by hospitals or by persons having infectious or contagious diseases.

Sixteen States absolutely prohibit the use of such materials in the manufacture of bedding, and four States prohibit their use unless sterilized.

Twenty-three States require the tagging of bedding with labels, which, in most of these States, must describe the material used in manufacture, and indicate whether new or secondhand. In a few of the statutes, it clearly appears that the purpose of the tagging provisions is to prevent fraud upon purchasers, but in most of the statutes the purpose of the tagging provisions is not indicated. In nine of the twenty-eight States inspection of bedding factories is authorized.

Of the twenty-eight bedding statutes, eleven do not apply to shoddy. In the seventeen statutes which mention shoddy by name, or cover it by definition, five permit its use if sterilized, and one permits its use if properly labelled. In these six States the definition applies only to old shoddy, or that which is made from old or secondhand materials which have had previous use.

In nine of the remaining eleven States limiting the use of shoddy, the statutory definition clearly applies only to old shoddy.

It is only in Pennsylvania and in Maryland that the law is so broad as to cover filling made by grinding up perfectly new and unused fabric. The Maryland statute was passed in 1924, modelled after the Pennsylvania statute.

None of this legislation in Pennsylvania related to comfortable until the Act of 1923. Upon page 146 of the Record appears this stipulation:

> "Stipulation re Act of 1913.
>
> It is agreed by and between counsel that the Act of 1913, and the Amendment of 1915, did not apply to comforters; that comforters were first covered by Pennsylvania legislation by the Act of 1923."

There has been no judicial interpretation of any of these statutes except in the case of *People vs. Weiner,* 271 Ill. 74; L. R. A. 1916 C. 775, which we cite below in our brief.

Historically, we are reminded of the Pennsylvania oleomargarine legislation, beginning in 1878. In 1885 an Act was passed with drastic provisions as to the prohibition of oleomargarine. These Acts passed through this Court in *Powell vs. Commonwealth,* 127 U. S. 678, 8 Sup. Ct. 992, and *Schollenberger vs. Pennsylvania,* 171 U. S. 1. Now the tumult about oleomargarine has ceased and it is recognized as a

useful and wholesome commodity. All that is required is that the vendor of it shall obtain a license, with the exercise of a little care as to the provisions of the statute relating to coloring, etc.

V. EVIDENCE SUBMITTED TO THE COURT.

The testimony in this case makes clear the following uncontroverted facts:

The world's supply of new wool is insufficient to clothe the people of the temperate zones and to meet other demands. This scarcity and the public demand for cheaper substitutes require the commercial use of reclaimed wool and cotton fibre (Record, p. 96). In the United States, as shown by the 1920 census, many millions of pounds of reclaimed fabric, part secondhand and part new, are picked apart and shredded in such manner that the original fibres may be rewoven into fabrics or made into sheets or bats, to be used as a filling material for bedding, cushions, stuffed furniture, etc. Mr. Dean, of the American Woolen Company, testified (Record, pp. 93, 94) that practically all the woolen cloth woven in the United States contained some shoddy. Shoddy is used in the manufacture of clothing, blankets (Record, p. 94), underwear (Record, p. 102), hosiery, gloves, sweaters, and all kinds of garments. Mr. Dean testified (Record, p. 93 *et seq.*) that woolen rags were used in the making of shoddy for ultimate use in textile materials without being cleansed (Record, p. 94), sterilized or carbonized in any way. Shoddy is also used for making saddler's felt, which is used in surgery, underneath a cast and next to

the body (Dr. Sherman, Record, p. 77). Shoddy is also used in making absorbent cotton and surgical bandages by the largest producers in the country of these commodities (Record, pp. 101-102). Mr. Moore testified that shoddy was sold on the market as a common article of commerce in the form of shoddy bats or sheets, the only use of which is for the making of comfortables or quilts for domestic use by the housewife. These bats are not prohibited by the Act. It was proved in evidence that some of the higher grades of shoddy are made from materials costing as high as $1.38 per pound, which are finer and better than many classes of new cotton or wool. Mr. Howard Palmer offered in evidence a baby comfortable from the plaintiff's mills, filled with a beautiful white fleecy filling made from French underwear clippings, garnetted into shoddy that, to the eye at least, seemed to be as pure and clean as could be desired. Under the Act, this filling made from new materials of the finest grade of wool is classed as shoddy and is prohibited. Coming to the comfortable filled with shoddy made from so-called secondhand material, it appears in the testimony, particularly that of Mr. Kahl (Record, p. 67 *et seq.*) of Arbuthnot-Stephenson Company, a large wholesale drygoods company, that the lowest priced comfortables on the market are those made of secondhand shoddy; that they are desired by many classes of people of moderate means and are dealt in extensively; that nothing in the line of comfortables approaches them in cheapness of price and that nothing of the bedding line can be substituted to give as much warmth as these for the same price. In point of price, the nearest comfortable filled with

new material costs more than twice as much to the consumer (Record, p. 67). No substitute of equal warmth, cheapness and utility can be found to take the place of old shoddy. It was suggested by counsel for the Commonwealth in examination of witnesses that cotton linters or the short cotton fibre cut from the cotton seed after ginning would be an effective substitute for shodding as filling. The testimony of Mr. Howard Palmer shows (Record, p. 51) that on account of its lack of cohesion and dustiness it cannot be used as a filling material. It is used, however, as a filling for mattresses, but it has to be blown in (Record, p. 104).

It is undenied and is a well recognized fact that any fabric from which shoddy may be made, may be sterilized by processes which are comparatively cheap to operate. The testimony of Dr. Sherman (Record, p. 75 *et seq.*), Mr. Stewart (Record, p. 84), Mr. McCarthy (Record, p. 86), and Mr. Dohr, (Record, p. 86), shows that steam sterilizers have been used for years by the Carnegie Steel Company, the Municipal Hospital of Pittsburgh, the St. Francis Hospital and the Tuberculosis League, for the purpose of sterilizing mattresses, pillows and bedding. In the case of the hospitals, it is shown that bedding used by persons afflicted with the most virulent of infectious and contagious diseases is sterilized and used over and over again until worn out. It is not questioned that the sterilization renders the bedding safe for use by subsequent patients. The appellee sterilizes, in machines of the same make as those used by the above named hospitals, all the materials which it makes into second-

hand shoddy. The effectiveness of their sterilization is proved by the testimony of Dr. Newlands (Record, p. 70), based on a scientific bacteriological test. Sterilization costs the appellee one-eighth of a cent per pound of material sterilized, which would amount to about one cent for each comfortable manufactured, a negligible figure in comparison with the price of the finished article.

The very interesting testimony of Dr. Winslow of Yale University (Record, p. 105 *et seq.*), which was uncontradicted, shows that the popular impressions as to the spread of infection are entirely erroneous. The bacteria of disease are transmitted almost entirely by immediate contact with an infected human being, or by coming within the range of such a person's cough, or by actually handling things used by such a person within a short period of time after exposure to the infected person. Bacteria do not thrive outside of a human or animal organism and when separated from their natural habitat die off very rapidly. Within a few days after a garment, for example, is removed from an infected person, practically all danger of the transmission of disease from it is gone, on account of the death of any bacteria which may be in it. Disease germs die out very rapidly outside the body (Record, p. 107). Bacteria cannot move about. Lice and other vermin which do move about require contact with living organisms in order to survive, and they cannot live long in an inanimate object such as an old garment. The chances of the survival of bacteria or lice in the materials which are made into shoddy after the several weeks required as a minimum for the process of manufacture into shoddy, storage and shipping are none.

Even if they could survive for this period of time, they would not be likely to survive the shoddying process and would certainly not survive sterilization. There could be no more danger from shoddy than from secondhand materials. The danger of the spread of communicable disease from shoddy or anything else depends on its exposure to an infected human being within a period of a few weeks (Record, p. 106). Dr. Winslow was of the professional opinion that in the interest of public health it was proper to regulate the *use* of bedding material, but not the material itself (Record, p. 109). He cited a number of eminent bacteriologists who agreed with him in his views expressed on the stand, and testified that there was no modern disagreement on the subject among men of science (Record, p. 147 *et seq.*).

Dr. Newlands testified (Record, p. 72 *et seq.*) that with respect to inspection, the presence of bacteria, harmful or beneficent, in shoddy, secondhand material, or in anything else, could not be determined by unaided sight, but could only be determined by laboratory inspection. Dr. Newlands testified that the inspection of comfortables to determine the presence of dangerous bacteria would be no more difficult than the ordinary health department inspection of milk. It is as easy to determine the presence of bacteria in shoddy as in secondhand material.

The defendant offered no testimony contradicting the foregoing. Nothing was offered to prove any danger to health from the use of shoddy. The defendant showed at most an aesthetic displeasure at the thought of using "shoddy."

VI. THE PROTECTION AFFORDED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The appellee believes that the statute before the Court violates the Fourteenth Amendment of the Constitution of the United States, which reads in part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The statute works a deprivation of liberty and property. If this interference is reasonable and fair, the statute may be sustained as a proper exercise of the police power. If the interference is an unreasonable and arbitrary exercise of the police power, or if it has no substantial relation to the public health, the Act violates the Fourteenth Amendment and is unconstitutional. *Mugler vs. Kansas,* 123 U. S. 523; 31 L. ed. 210. In this case the Court said:

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

The Fourteenth Amendment protects persons in the pursuit of lawful occupations.

> "A State may not under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions, upon them."
>
> *Jay Burns Baking Company et al. vs. Charles W. Bryan et al.,* April 14, 1924, 68 L. ed. 459.

> "The term (liberty) is deemed to embrace the right of the citizen to be free in the engagement of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."
>
> *Allgeyer vs. Louisiana,* 165 U. S. 578.

What rule shall guide the Court in determining whether a statute is an arbitrary and unreasonable exercise of the police power? The point is ruled and the principle seems to be that where there is any doubt as to whether or not a thing prohibited is obnoxious, poisonous or harmful, the determination by the Legislature is conclusive; but if there is no doubt; that is, if the testimony in the case shows that the thing prohibited is not harmful, or that it may be rendered

harmless by proper regulation, then the Court may say that its prohibition is unreasonable and arbitrary.

In *Price vs. Illinois,* 238 U. S. 466, 59 L. ed. 1400, the Court said:

> "The contention of the plaintiff in error could be granted only if it appeared that by a concensus of opinion the preservative was unquestionably harmless with respect to its contemplated uses; that is, that it indubitably must be classed as a wholesome article of commerce so innocuous in its designed use and so unrelated in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizen. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided."

In *Meyer vs. Nebraska,* 262 U. S. 390, 67 L. ed. 1042, it is said:

> "Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the Courts."

The last clause of the Fourteenth Amendment, which provides that no State shall deny to any person within its jurisdiction the equal protection of the

laws, protects persons from discriminatory or class legislation.

> "It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."
>
> *Missouri vs. Lewis,* 101 U. S. 22.

> "That clause (the equal protection of laws) secures equal protection to all in the enjoyment of their rights under like circumstances."
>
> *Terrace vs. Thompson,* 263 U. S. 197, 218; 68 L. ed. 255, 275.

VII. SIMILAR LEGISLATION HELD UNCONSTITUTIONAL.

In *People vs. Weiner,* 271 Ill. 74; L. R. A. 1916, C. p. 775, the Court considered the Illinois statute forbidding the use of secondhand cotton in the making of bed comfortables, etc. This is the only case to be found passing upon the constitutionality of regulations concerning the use of such secondhand material in manufacturing processes. The Court held that the Act was an unconstitutional deprivation of property without due process of law.

The Court says:

> "The uncontroverted testimony in the case was to the effect that sterilized secondhand material or a sterilized secondhand mattress would be safer for use than a new mattress not sterilized; that

even hospital bedding used by patients having contagious or infectious diseases is not destroyed, but is sterilized, except that in straw or excelsior mattresses the cover is sterilized and refilled with new material, because the cost of new straw or excelsior is cheaper than the cost of sterilizing the old; that sleeping upon a used mattress or being covered by a comforter or quilt, which has been used, is not dangerous to health *per se*. The proof was that the chance of coming in contact with infected bedclothing is always present in traveling and stopping at hotels, and a new mattress, if not sterilized, is liable to carry contagion; that any renovation short of sterilization fails to render a mattress or bedding free from the possibility of communicating infectious or contagious disease if the germs are present; that a bed comforter or mattress used by a normally healthy person would not be injurious if used by another person, nor be injurious to the public health; that it was the practice of hospitals and the public institutions to sterilize bedding, which rendered it safe for further use.

"Counsel for plaintiff in error contended below, and contend here, that said act is unconstitutional, violating both the state and the federal constitutions, as denying to the one punished thereunder due process of law. If the act can be sustained at all, it must be under the police power of the state. * * * The act does not attempt to prohibit the use of secondhand mattresses, but does prevent their ever again being

used in the manufacture of other mattresses which are to be sold. To prohibit absolutely the use of such material in the manufacture of mattresses for sale when not inherently dangerous, and when it may be rendered safe by reasonable regulations, is an invasion of personal and property rights within the meaning of the Federal and State constitutions. By this Act the State has deprived the citizen of the lawful use of his property in a manner not injurious or dangerous to others. It is argued by the State that laws similar to this have been passed in other jurisdictions in this country, but, so far as we are advised, the highest courts of those various states have not passed on the constitutionality of any of those acts. Indeed, the wording in most of those statutes is so very different from the wording of this statute that any ruling as to them would be of very little assistance in this case. A city ordinance very similar in some respects to this statute was held unconstitutional by the Supreme Court of Alabama in *Greensboro vs. Ehrenreich,* 80 Ala. 579; 60 Am. Rep. 130; 2 So. 725.

"The argument of counsel for the state that this act should be upheld in order to prevent fraud or deceit in the sale of goods is without merit. The provision in par. 3 of the act requiring that material used in remaking mattresses, quilts, and comforters for the person's own use must be sterilized does not violate any constitutional prohibition, and is a proper exercise of the police power. That same requirement

could be made in an act with reference to the manufacture and sale of mattresses. Regulations to prevent fraud and deceit in such manufacture and sale could be very readily provided, so as to protect the public without prohibiting the use of secondhand material if properly renovated and sterilized. The power of the legislature to protect society from disease or epidemic is very broad, but the legislature cannot arbitrarily destroy property, or any substantial interest therein, under the guise of a health regulation, or for the ostensible purpose of preventing fraud or deceit.

"Counsel for plaintiff in error further argue that there is a discrimination between the manufacturers and dealers in pillows and manufacturers and dealers in mattresses, comforters and quilts, especially after they have been used, as there is no provisions made as to pillows; that, so far as this Act is concerned, material made secondhand in the same way as the material in mattresses may again be made into pillows and sold without any regulation whatsoever. Under the decisions of this state this is class legislation.

* * * * * * * *

"The provisions of Paragraphs 1 and 2 of the act are arbitrary and unreasonable, and must be held unconstitutional and void."

In the case of *Greensboro vs. Ehrenreich,* 80 Ala. 579, the Supreme Court of Alabama had before it the question of the validity of an ordinance which provided that "it shall be unlawful for any person

to import, sell or otherwise deal in cast-off garments, blankets, bedding, or bed-clothes in said town of Greensboro: Provided, that this ordinance shall not apply to the sale of said articles not imported, and that have not been used by persons having infectious diseases." The Court said:

> "Municipal authorities, having power to abate nuisances, cannot absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. They cannot, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. If they can declare it unlawful to import, sell or otherwise deal in secondhand or cast-off garments, blankets, bedding and bed-clothes, without regard to the circumstances or necessity, they may, under the same power, declare it unlawful to import or sell meat because at some times and in some places, it is infected with trichina, or other kind of food, because liable to adulteration. That the ordinance is founded on the fear and apprehension of possible danger, and not on its existence, is shown by the unequal discrimination between articles imported and not imported. We cannot regard it a legitimate exercise of the power conferred by the act of incorporation."

In *State vs. Taft,* 118 N. C. 1190, 32 L. R. A. 122, the Court had before it for consideration an ordinance making it unlawful to import secondhand clothing, etc., into a town. The ordinance was held to be void. The Court held that the business was a

lawful business, not in itself necessarily a nuisance, but it might be conducted without danger to the community when properly regulated. The Court says:

> "The question presented in this case for our consideration is whether the commissioners can, under the powers given them by law, in their discretion, absolutely prohibit a lawful business, not in itself necessarily a nuisance, but which may be conducted without danger to the community, when properly regulated. The sale of secondhand clothing is not a nuisance *per se,* but is, on the other hand, a lawful business and, under proper regulations, may be so conducted as to be without danger to the health of the community, and at the same time to be of great benefit to a large portion of the people. There is nothing dangerous to health in articles of secondhand clothing, of themselves. They can only become noxious by reason of prior use—of having been worn or possessed by persons themselves infected or living in infected communities. The town authorities would have the right to compel fumigation and disinfection of secondhand clothing. They might require proper assurances, before such articles were imported or offered for sale, that they have not been bought in or brought from markets or places where epidemics of contagious or infectious diseases were or had been recently prevailing, or they might prohibit the further sale of such stocks from which articles had been sold and had communicated disease. In the case of *Greensboro vs. Ehrenreich,* 80 Ala. 579, 60 Am. Rep. 130, the ordinance was not as

prohibitory as the one before us, and the court there, in passing upon its validity, said: 'Municipal authorities, having power to abate nuisances, cannot absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. They cannot under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. If they can declare it unlawful to import, sell or otherwise deal in secondhand or cast-off garments, blankets, bedding and bed-clothes, without regard to the circumstances or necessity, they may, under the same power, declare it unlawful to import or sell meat because at some times and in some places it is infected with trichina.' The same principle is also decided in *Weil vs. Ricord,* 24 N. J. Eq. 169. We are of the opinion that the commissioners transcended their powers in the passing of this ordinance; that it is unreasonable, in that it is prohibitory of a business lawful in itself, and that it is void."

In *Koscinsko vs. Slomberg,* 68 Miss. 469, the Court considered a municipal ordinance similar to that in the *Greensboro vs. Ehrenreich* case. The ordinance prohibited secondhand clothing from being brought into or offered for sale within a town without first proving that it was clean and that it did not come from a place where contagion or infection is or had been prevailing. The Court held the ordinance to be unreasonable and void.

VIII. THE PROHIBITION OF AN ARTICLE IS UNCONSTITUTIONAL IF REGULATION WILL ACCOMPLISH THE INTENDED PURPOSE.

A State, in the exercise of its police power, cannot absolutely prohibit the use of a commercial commodity when by proper regulatory provisions it may be rendered harmless to health.

It is said in the case of *People vs. Weiner*, 271 Ill. at page 80:

> "The act does not attempt to prohibit the use of secondhand mattresses but does prevent their ever again being used in the manufacture of other mattresses which are to be sold. To prohibit absolutely the use of such material in the manufacture of mattresses for sale when not inherently dangerous and when it may be rendered safe by reasonable regulation is an invasion of personal and property rights within the meaning of the Federal and State constitutions. By this act the State has deprived the citizen of the lawful use of his property in a manner not injurious or dangerous to others."

It was said in *Hannibal & St. Joseph R. R. Co. vs. Husen*, 95 U. S. 465:

> "Many acts of a State may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and

that which regulates or furnishes a rule for conduct. There is no such difficulty in the present case. While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

It was said in *Greensboro vs. Ehrenreich,* 80 Ala. at page 582:

"The general statutes provide quarantine as the means to prevent the introduction of infectious or contagious diseases. To this end, any town or city may establish a quarantine ground; the corporate authorities may, from time to time, prescribe the quarantine to be observed by all vessels arriving within the harbor or vicinity; may extend such regulations to all persons, goods, and effects in such vessels; and may compel any person coming into town, by land, from a place infected with a contagious disease, to perform quarantine, and be restrained from traveling until discharged.—Code of 1876, secs. 1507-1512. The policy of the statutory provisions is the regulation

of trade and travel by temporary restraint, not extending beyond the occasion and scope of the necessity—self-defensive, which is the limitation on the police power of the State imposed by the Federal Constitution.—*Railroad vs. Husen,* 95 U. S. 465."

See *State vs. Taft,* 118 N. C. 1190, at page 1192, *supra,* the passage which we have quoted on page 25 *et seq.*, of this brief.

In the case of *Valley Railways vs. Harrisburg,* 280 Pa. 385, 396; 124 Atl. 644, 648, the Court says:

"True, in accepting the franchise ordinance the company agreed to 'subject itself to all regulations of the city now in force or hereafter made', but that must be construed reasonable regulations. What the 1923 ordinance attempts is not regulation but prohibition; for, as we have stated, its effect is to exclude appellant from Second Street, under conditions as they now are and have been for thirty years. A statute or ordinance to be valid under the police power must be reasonable: *York Water Company vs. York,* 250 Pa. 115, 119; and see *Mahoning & Shenango Ry. & Light Co. vs. New Castle,* 233 Pa. 413; *Pennsylvania R. R. Co.'s Case,* 213 Pa. 373. Regulation is not to be carried to the extent of prohibition: *Jitney Bus Assn. vs. Wilkes-Barre,* 256 Pa. 462. The power to regulate is not a power to destroy. A limitation is not the equivalent of confiscation: *Railroad Commission Cases,* 116 U. S. 307, 331; *Freund Police Power,* section 63."

The case of *City of St. Louis vs. Evraiff* (Supreme Court of Missouri, 1923), 256 S. W. 489, involved the provisions of a zoning ordinance which prohibited the use of property in industrial districts for the storage of scrap, rags, junk, etc. The Court, in holding the prohibitory provisions invalid, said at p. 494:

> "It is clear that the exercise of the police power in reference to private occupation is limited to such regulations as may be reasonably necessary for the protection of the peace, health, and comfort of society."

The case of *Booth vs. Illinois,* 184 U. S. 424; 46 L. ed. 623, involved a statute prohibiting against options to buy or sell grain futures. The Court said:

> "If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law".

In the case of *Marymont vs. Nevada State Banking Board,* 33 Nev. 333; 111 Pac. 295; 32 L. N. S. 477, the Court quotes with approval *Tiedeman on Police Power,* p. 301, as follows:

"It has also been maintained, and I think satisfactorily established, that no trade can be prohibited altogether, unless the evil is inherent in the character of the trade, so that the trade, however conducted, and whatever may be the character of the person engaged in it, must necessarily produce injury upon the public or upon individual third persons".

We are not forgetting in this connection the decisions of the Court as to the right of a State to prohibit absolutely the sale of certain commodities within its borders, even if those commodities have been sold commercially for years and are recognized in the market. We have in mind the Oleomargarine Cases: *Powell vs. Pennsylvania,* 127 U. S. 678; the Liquor Cases: *Crane vs. Campbell,* 245 U. S. 304; and the Boric Acid Case: *Price vs. Illinois,* 238 U. S. 446; but there is in these cases no doubt as to what was the intention of the State. There is no need of a definition of oleomargarine, or intoxicating liquor, or boric acid; nor can the character of any of these commodities be changed by sterilization or disinfection; they are always the same and remain so under all ordinary conditions. Under the definition of this statute, it surely prohibits some things which are known in the trade as "shoddy," which the Legislature could not have intended to prohibit except by the most unreasonable and arbitrary exercise of its police powers.

IX. THE APPLICATION OF THE LAW TO THE TESTIMONY.

Viewing all the testimony in the light of the law applicable to the case, it first appears that the statute resorts to the drastic extreme of prohibiting shoddy, for the ostensible purpose of protecting health, instead of resorting to regulation. There are in our whole body of law few prohibitions, and these may be justified on the ground of a universal conviction of public danger, and the necessity of absolute prohibition as the only safeguard. In this statute there is no legislative "determination" or "finding" that shoddy is so detrimental to health that its use must be forbidden. There is no preamble or declaration of its danger, and no explanation of the complete prohibition. The appellant has not attempted to contradict the appellee's testimony concerning the nature of shoddy, except in a general way, by the broad testimony of Dr. Joachim and Mr. Bright. This was to the effect that shoddy sometimes was made of filthy rags and that it contained dust. There is no proof of a single case of disease traceable to the use of shoddy, and no denial of the appellee's testimony of the remote possibility of disease from shoddy. Dust in itself is not dangerous (Record, p. 118). The appellant appears to rely on the argument that the legislative discretion in police power matters should not be lightly disturbed by the courts. But in this statute the Legislature has *prohibited* when it might have accomplished its legislative purpose perfectly by *regulating*. At one sweep it wipes out a great trade in a commodity of everyday use which is de-

manded by the needs of the community. Without distinction it wipes out the dainty coverlet made of pure French wool, together with the cheapest grades of old shoddy comfortable. If any of the things excluded by a prohibition are unquestionably safe for public health, then the prohibition is arbitrary. The coverlet filling was made from wool clippings of the highest grade of underwear changed into *what the Act calls* shoddy. The statute bars the filling as shoddy, although no one could say that the intermediate process of shoddying made it more dangerous to use than the original fabric. This is unreasonable. This legislative prohibition is a perfect example of a law based either on misunderstanding of the broad application of a definition, or else on lack of knowledge of a great industry. The Court should look behind the opprobrious implication of the word "shoddy" acquired by historic accident in the commercial cheating of the Civil War, and view as a whole the great industry in reclaimed wool and cotton fibre. Viewed in this way, prohibition is absurd. It becomes particularly absurd when it appears that the perfect protection of health can be accomplished by cheap and commercially practicable sterilization.

Considering the testimony now from the point of view of the "equal protection clause" of the Constitution, gross discrimination appears (1) in the fact that while the Act prohibits shoddy altogether, it permits secondhand materials and new and secondhand feathers, if sterilized; and (2) in the fact that it prohibits shoddy in the making of comfortables, mattresses, etc., but permits shoddy in another article

of bedding of identical use, the blanket, and also permits its use in any other way.

The testimony shows that virgin wool in the grease, which is sometimes spun and woven into cloth, often contains the very dangerous spores of anthrax. The Act permits the use of virgin wool as filling for comfortables and mattresses. Virgin wool might well be unwashed dung-locks or the blood-matted refuse of the abattoir. The Act permits cotton linters, which are a by-product of the manufacture of cottonseed oil. The cotton seeds are shoveled about by barefooted negroes and are stored and shipped like coal. The sweepings of the cotton mill and the wool storehouse may be used with impunity, for they are new. Hair from China, jute from India, moss from the swamp, and straw from the livery stable may be used, but shoddy from perfectly new and unused fabrics is barred. Under the Act, it is proper to take the stained stuffing of an old mattress, sterilize it and make a new mattress out of it. It is a misdemeanor, however, to use filling made from new underwear clips. Under the Act, it is proper to stuff an old coat whole into a mattress, if it is sterilized. If the same coat is ground up into a fluffy mass, so as to be better used as a filler, it is barred.

The Act permits the use of the same mattresses and blankets by different persons night after night in hotels and Pullman cars. It permits hospitals to use the same bedding over and over again for one diseased patient after another. The mattresses from the pest-house are remade and renovated legally

under the Act with sterilization. Shoddy, however, is prohibited.

The Act permits shoddy in blankets, which come into immediate contact with the body. It prohibits shoddy in comfortables, which encase the shoddy in a cover of new fabric. Failure to extend the Act to shoddy in trades so closely allied to comfortable manufacture as not to admit of any difference from the point of view of public welfare, is a discrimination which is palpably unreasonable and therefore unconstitutional. It was so decided in the case of *People vs. Weiner,* 271 Ill. at page 81:

> "Counsel for plaintiff in error further argue that there is a discrimination between the manufacturers and dealers in pillows and manufacturers and dealers in mattresses, comforters and quilts, especially after they have been used, as there is no provision made as to pillows; that, so far as this act is concerned, material made secondhand in the same way as the material in mattresses may again be made into pillows and sold without any regulation whatever. Under the decisions of this state, this is class legislation."

X. THE POWELL CASE.

Under the heading of "A Ruling Case," on page 30 of his brief, the appellant devotes some discussion to the case of *Powell vs. Commonwealth,* 127 U. S. 678. We call attention to Judge Schoonmaker's reference to this case, on page 156 of the Record:

> "In connection with our opinion on this branch of this case, we may say that we are not unmindful of the decisions of the Supreme Court which have sustained absolutely the state statutes which prohibit the sale of certain commodities among which may be noted: the oleomargarine cases: *Powell vs. Penna.,* 127 U. S. 678; the liquor case: *Crane vs. Campbell,* 245 U. S. 304; and the boric acid case: *Price vs. Illinois,* 238 U. S. 446. In those cases there was no possibility of the character of the commodities in question being changed by sterilization so as to render them harmless. Those cases there are not parallel with the instant case, where all possible harmful qualities of shoddy may be removed by sterilization."

Oleomargarine might readily be mistaken for butter and so with food stuffs containing boric acid. They might be mistaken for unadulterated food stuffs, and skimmed condensed milk might easily be mistaken for condensed milk containing butter fat. Shoddy resembles no other material. It is always shoddy and can be distinguished as such. The claim of the State is that shoddy made from old materials cannot be distinguished from shoddy made from new. This

would no more warrant the suppression of new shoddy than would the resemblance of oleomargine to butter warrant the prohibition of butter. The fact is that inspection of shoddy may be made to determine whether it is old or new or whether clean or unclean in exactly the same way as milk and food stuffs are inspected at present. The only way that inspection can be made is by sample and analysis. It is enough for health purposes and to prevent fraud that the safety of the material may be determined in the ordinary known ways just as milk and food stuffs are inspected. The safety of none of these can be told by view but only by analysis. It would be an unfair test to require more of shoddy.

XI. THE EFFECT OF THE DECISION ON THE WHOLE ACT.

The appellant says, on page 26 of his brief:

"It is apparent, however, that even were the Court right in its findings that the classification is arbitrary, the conclusion reached by the Court is fatally defective. The conclusion of the Court is that the only provision of the Act which violates the 14th Amendment is the provision which absolutely prohibits the use of shoddy in the articles covered by the Act. Yet every provision of the Act is based upon the same classification and therefore if the classification is arbitrary the equal protection of the laws clause of the 14th Amendment is violated by the entire Act, and the entire Act must fall."

The suggestion of counsel for appellant, that under the decision the whole Act should fall, is quite right. The Trial Judge, however, did not care to strike down the whole Act unless it was imperative. The appellee logically might complain because the Court did not strike down the whole Act, because it felt that some of the provisions as to tagging regulation, etc. were unreasonable; but these questions could not be raised under Judge Schoonmaker's decision unless the appellee appealed.

Again, the counsel for appellant says, on page 29 of his brief:

> "If we correctly interpret the view of the Court below on this point, the revision of the Act to meet its objections would still leave us with an unconstitutional statute, because of the absence of a requirement that new material be sterilized, and owing further to the fact that it is absolutely necessary to regulate the use of feathers as a filling for bedding in a different way than some other materials are regulated. We respectfully submit that the fallacy of this feature of the Court's opinion is apparent."

Why should he complain? This decision does not interfere in any way with the regulations provided by the Act. The Court has indicated that the only fault that it finds with this Act is the prohibition of shoddy. It is easy enough for the Commonwealth to provide for regulation as to shoddy if it wishes.

XII. CONCLUSION.

We believe that under the evidence in this case and the decisions which are applicable, some of which we have cited, we may safely reach these conclusions:

The right of Palmer Brothers Company to do business in Pennsylvania is protected by the Fourteenth Amendment to the Constitution of the United States.

The legislature of Pennsylvania may not enact a statute which, in its relation to its own citizens or the citizens of another State, is an unreasonable and arbitrary exercise of the police power.

The judgment of the legislature is conclusive as to the harmful character of something prohibited, if it is conceded to be harmful, or if it is debatable whether it is harmful or not. The courts may declare a statute invalid which prohibits an article which is not harmful or may be rendered harmless by proper treatment.

Shoddy in itself is not harmful as a filling for comfortables. It may be effectively sterilized and rendered absolutely safe by practicable commercial processes.

The prohibition of the use of shoddy in comfortables and the permission of its use in blankets and clothing is class legislation and invalid. The prohibition against shoddy, in view of the permitted use of

sterilized secondhand materials, is a gross discrimination.

If we are right in these conclusions the decree should be affirmed and the appeal dismissed.

Respectfully submitted,

FRANK L. MCGUIRE,
CARL E. GLOCK,
EDWIN W. SMITH,
Attorneys for Appellee.